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ABSTRACT

Until the 1960s, the special needs of migrant students were seldom considered in the formulation of educational policy. Since that time, migrant parents and other concerned parties have sought redress in the court system, and Congress has passed legislation to provide support for migrant education. This chapter describes major pieces of federal legislation and several court cases that have shaped migrant education. First passed in 1965 and reauthorized many times since, the Elementary and Secondary Education Act (ESEA) provides the framework for state-run migrant education programs to receive federal funds. Reauthorizations of ESEA, such as the No Child Left Behind Act, outline eligibility requirements for student participation; facilitate interstate cooperation, particularly with regard to the transfer of student records; and mandate accountability procedures and certain actions by schools, such as establishment of parent advisory councils. Important court cases include Valdes v. Grover, a Wisconsin case that reinforced the participation of significant numbers of migrant parents in their children's education; Zavala v. Contreras, a Texas case about school district cut-off dates that prevented migrant students from participating in an extended-day program to make up missed work; and Lau v. Nichols, a U.S. Supreme court ruling requiring schools to meet the special educational needs of English language learners. The Equal Educational Opportunity Act of 1974 reinforced this decision. The impact of the Biiingual Education Act of 1968 on migrant education is also discussed. (SV)

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CHAPTER 2

The Legislation of Migrancy: Migrant Education in Our Courts and Government

ELENI PAPPAMIHIEL[1]

In recent decades, our schools have become increasingly diverse. As educators and other policymakers have increased their focus on minority issues, the challenges facing migrant students have become more visible and important in mainstream deliberations.

Historically, migrant children have been present in our communities at least since the 1920s.[2] Yet, their educational needs rarely were considered in the formulation of school policies or in making educational decisions until the late 1960s. Migrant students most often were an afterthought, if they were considered at all, even though they were more at risk than most students. Since the 1960s, migrant parents and other concerned parties have sought redress in our court systems, and Congress has passed legislation aimed at providing valuable supports for migrant education.

Federal efforts began in the wake of the civil rights movement of the 1960s. During this time of sweeping advances for many minority

[1]The author would like to thank Roger Rosenthal of the Migrant Legal Action Program for his help and information regarding migrant issues.

[2]Philip Martin, *Promise Unfulfilled: The Agricultural Labor Relations Act, Unions, and Immigration in California* (Ithaca, NY: Cornell University Press, 2003).

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groups, members of Congress, such as William Ford of Michigan, determined that migrant students had special educational needs that were not being addressed adequately at the state or local level.

The federal government's growing role in education has been met with mixed reactions. Proponents of federal involvement with state education systems have applauded congressional action to improve education around the country. They see the unaddressed educational needs of underserved populations as calling out for federal involvement and funding. On the other side of the issue, some individuals have opposed any effort by the federal government that could potentially restrict the states' freedom in determining their own educational paths. However, in the case of migrant students, there has been relatively little resistance to federal involvement. Migrant students' mobility makes their educational needs uniquely national, preventing any one state from addressing these needs fully. Providing an adequate education for migrant students demands interdependence among states and education systems around the country.

Perhaps the most significant piece of federal legislation for migrant students was the 1965 Elementary and Secondary Education Act (ESEA), which grew dramatically in scope and size through a series of reauthorizations. In the 2001 reauthorization of ESEA, the federal government will spend approximately $29.6 billion, a portion of which has been earmarked to meet the particular educational needs of migrant students. This chapter describes the impact of recent reauthorizations of the ESEA on education practices. The chapter also examines how the U.S. court systems and the Bilingual Education Act have affected the migrant community.

Table 1. Time Line of Events Affecting Migrant Education

1965	Congress passes the Elementary and Secondary Education Act (ESEA).
1966	The Migrant Education Program is created.
1968	Congress passes the Bilingual Education Act.
1974	Congress passes the Equal Educational Opportunity Act.
1983	The *Valdez v. Grover* decision provides support for parent advisory councils.
1984	The *Zavala v. Contreras* decision eliminates cut-off dates for migrant student enrollment.
1994	Congress reauthorizes the ESEA under the Improving America's Schools Act.
2001	Congress reauthorizes the ESEA under the No Child Left Behind Act.

ESEA, Yesterday and Today

The ESEA has been reauthorized about every five years since its original passage in 1965. While the ESEA has undergone many changes, the programs that specifically address the needs of migrant children have remained relatively constant. Amazingly, as other programs have come and gone, migrant funding has remained comparatively stable.

This important piece of legislation has been a major force in shaping education in the United States and provides a framework for states to receive federal funds. Since the first inclusion of migrant children in Title I of the ESEA in 1966, the Migrant Education Program (MEP) has been an important portion of the act. Additionally, migrant children are eligible for other funds under other provisions, such as Title VII (the Bilingual Education Act, now known as Title III) and Title I Basic. Altogether, states receive millions of dollars every year to serve migrant students. Under Titles I and III, the federal government provides funding for programs designed and implemented through state education agencies (SEAs) and other agencies. According to Kris Anstrom and Anneka Kindler, the overall purpose of the MEP is to "meet the complex needs of migrant students and to facilitate interstate coordination of services."[3] Language in section 1301 of the most current ESEA, the No Child Left Behind Act, defines this important mission in greater detail:

> SEC. 1301. PROGRAM PURPOSE.
>
> It is the purpose of this part to assist States to
>
> (1) support high-quality and comprehensive educational programs for migratory children to help reduce the educational disruptions and other problems that result from repeated moves;
>
> (2) ensure that migratory children who move among the States are not penalized in any manner by disparities among

[3]Kris Anstrom and Anneka Kindler, *Federal Policy, Legislation, and Education Reform: The Promise and the Challenge for Language Minority Students*, NCBE Resource Collection Series No. 5 (Washington, DC: National Clearinghouse for Bilingual Education, 1996), http://www.ncbe.gwu.edu/ncbepubs/resource/fedpol.htm/ (accessed November 7, 2002), 13.

the States in curriculum, graduation requirements, and State academic content and student academic achievement standards;

(3) ensure that migratory children are provided with appropriate educational services (including supportive services) that address their special needs in a coordinated and efficient manner;

(4) ensure that migratory children receive full and appropriate opportunities to meet the same challenging State academic content and student academic achievement standards that all children are expected to meet;

(5) design programs to help migratory children overcome educational disruption, cultural and language barriers, social isolation, various health-related problems, and other factors that inhibit the ability of such children to do well in school, and to prepare such children to make a successful transition to postsecondary education or employment; and

(6) ensure that migratory children benefit from State and local systemic reforms.[4]

The Office of Migrant Education (OME) provides funds to SEAs and other agencies to support these efforts. As a result, many states offer year-round services for migrant students.

Reauthorizations of the ESEA have not changed the MEP's regulations dramatically over the years. However, the reauthorizations have made the ESEA a more comprehensive document, reflecting broadened realizations and understanding of the migrant experience. For example, in the Educational Amendments of 1966, SEAs were allowed to use grant funds for programs of interstate coordination, realizing the importance of providing seamless services for migrant children. In the ESEA Educational Amendments of 1972, the federal government expanded the eligibility of some services to include preschool migrant children. A critical addition in 1978 required programs using ESEA

[4] *No Child Left Behind Act of 2001, U.S. Code*, vol. 20, sec. 1301 (2002), http://www.ed.gov/legislation/ESEA02/pg8.html/ (accessed January 8, 2003).

funds to establish parent advisory councils (PACs). This modification increased parent involvement in schools. In the most recent reauthorizations of the ESEA, programs serving migrant students have retained their PACs. Additionally, in the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988,[5] the age range at which funds could be distributed for migrant students was extended from 5-17 to 3-21, recognizing that migrant youth often need services beyond age 18. While this change did not alter eligibility to participate in a program, it did modify the age at which a child could generate funding within a program.

Over the years, certain patterns have emerged. A pattern during the past decade has been to transfer oversight responsibilities from the OME to individual states. Decentralization of the Migrant Student Record Transfer System (MSRTS) is a primary example. The states designed the MSRTS as a national system of tracking migrant students, incorporating not only academic credits but also such records as health care and immunization charts. The MSRTS was funded by earlier authorizations of the MEP and managed by the Arkansas Department of Education with oversight by the state directors of migrant education and the OME.[6] The system was terminated by the OME and not included in the 1994 reauthorization of the ESEA. The states assumed responsibility for transferring records of migrant students, with the federal government facilitating the process. In the most current reauthorization, the federal responsibility is to "ensure the linkage of migrant student record systems for the purpose of electronically exchanging, among the States, health and educational information regarding all migrant students."[7] Hence, in ESEA-No Child Left Behind, the federal obligation is to facilitate the process of record exchange but not to keep records. While seen by some as a money-saving measure, the elimination of this record system has resulted in

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[5] *Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988*, Public Law No. 100-297. Summary: http://thomas.loc.gov/cgi-bin/bdquery/z?d100:HR00005:@@@L|TOM:/bss/d100query.html|#summary (accessed May 22, 2003).

[6] Al Wright, *Reauthorized Migrant Education Program: Old Themes and New* (ERIC Digest) (Charleston, WV: ERIC Clearinghouse on Rural Education and Small Schools, 1995) (ERIC Document Reproduction Service No. ED 380 267).

[7] *No Child Left Behind Act of 2001*, sec. 1308.

incomplete records and contributed to inconsistent treatment of migrant students, multiple immunizations, and tracking problems as students move from state to state.

One of the most controversial aspects of the various amendments and reauthorizations of the ESEA is the evolving definition of a migrant student and the subsequent counting of these students. The original definition has broadened over the first two decades. The 1994 reauthorization of the ESEA[8] enacted certain changes, namely restricting migrant eligibility to students who had made a migratory move within the past 36 months, as opposed to the previous threshold of six years. Eligibility was expanded in 1994 to include spouses, and in 2002 to include independent migrant students who are no longer dependents of parents or guardians. Section 1309 of the No Child Left Behind Act, signed into law in January 2002, defined a migrant child as follows:

> The term migratory child means a child who is, or whose parent or spouse is, a migratory agricultural worker, including a migratory dairy worker, or a migratory fisher, and who, in the preceding 36 months, in order to obtain, or accompany such parent or spouse, in order to obtain, temporary or seasonal employment in agricultural or fishing work–
>
> (A) has moved from one school district to another;
>
> (B) in a State that is comprised of a single school district, has moved from one administrative area to another within such district; or
>
> (C) resides in a school district of more than 15,000 square miles, and migrates a distance of 20 miles or more to a temporary residence to engage in a fishing activity.[9]

However, the most current reauthorizations do not treat all migrant students equally. In some instances, former migrants who have settled permanently are excluded from services. Many view this development as unfortunate because former migrant children continue to suffer lingering disadvantages of migrancy long after settling in one place.

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[8] *Improving America's Schools Act of 1994*, Public Law 103-382. Full Text: http://www.ed.gov/legislation/ESEA/toc.html/ (accessed June 3, 2003).

[9] Ibid., § 1309.

The mobility of migrants and the different recordkeeping systems used by states often make it difficult for the OME to produce an accurate count of migrant students. However, recognizing that all migrant students do not follow traditional academic tracks, the ESEA emphasizes the inclusion of consortium programs that involve SEAs and other agencies providing after-school and summer programs for migrant children. These collaborative efforts help ensure that most migrant children have access to some services.

Another ESEA shift during the past decade relates to the accountability movement. The Improving America's Schools Act emphasized accountability for all students and charged the MEP with helping to ensure that all migrant students meet challenging content and performance standards. Both the Improving America's Schools Act and the No Child Left Behind Act have given priority to children at most immediate risk of failing to meet state content and performance standards. This requires that school districts become more involved in tracking and keeping records on migrant students so funds can be distributed in accordance with ESEA guidelines.[10]

No Child Left Behind strengthened accountability through testing requirements. States now must administer mathematics and reading tests in grades 3 through 8 to assure that high standards are being met. This particular requirement presents a problem for migrant students moving from one district or state to another. Since testing times are not standardized among states, migrant children could conceivably take one state's test in February and another state's test in April. A more likely scenario is that migrant children would miss a testing date in the district where they had received the most instruction, then be tested in a district to which they had recently moved. Either situation could result in questionable data as well as little actual instruction. Different states often base their tests on different standards, meaning that migrant students are sometimes held accountable for information they have not been taught. Such an instructional deficit places unusual pressure on children as they sit down to demonstrate mastery of unfamiliar content and skills.

The national move toward stricter accountability has also resulted in the use in some states of high-stakes tests, which become the sole

[10]Angela Branz-Spall, personal communication with author, January 31, 2002.

determining factor in graduation and grade matriculation decisions. While success on the test does not guarantee either graduation or matriculation, failure on these critical assessments can result in denial of a high school diploma or of promotion to a higher grade. Even students who are able to accrue credits may not graduate if they are unsuccessful on the state standardized test. Critics of such tests charge that some high school students drop out when they realize they will not pass the test and cannot graduate regardless of their success in class.[11]

Statewide school accountability systems also put pressure on administrators and teachers. Currently, federal law includes provisions for allowing parents who have children in schools with low accountability records to take their children to other schools, reducing the funding received by the original school. This pressure has led some schools and districts to use less-than-ethical practices to boost their accountability ratings. In Texas, principals have admitted to tampering with test scores and graduation rates to make their schools look better.[12]

Court Battles and Legislative Achievements

In the past several decades, only a few groundbreaking court cases have related directly to migrant students.

Valdez v. Grover[13]

The 1983 *Valdez v. Grover* decision reinforced the participation of significant numbers of migrant parents in their children's education. Shirley Valdez, on behalf of her minor children Celia, Antonia, and

[11]Alexandra Beatty and others, eds., *Understanding Dropouts: Statistics, Strategies, and High-Stakes Testing* (Washington, DC: The National Academies, Board on Testing and Assessment, 2001), http://www.nap.edu/books/0309076021/html/ (accessed October 30, 2003).

[12]Michelle M. Martinez, "District Fined for Altering Test Data; Austin school district Pleads No Contest to Tampering with TAAS Reports, Will Pay $5,000," *The Austin American Statesman*, January 9, 2002, A1.; and Diana Jean Schemo, "Questions on Data Cloud Luster of Houston Schools," *New York Times*, July 11, 2003, http://www.nytimes.com/.

[13]*Valdez v. Grover*, 563 F. Supp. 129 (W.I.W.D.C., 1983).

Raquel, sued Herbert Grover as Wisconsin state superintendent of public instruction and Donald Anderson as chief of the Special Needs Section of the Wisconsin Department of Public Instruction, among others. The suit argued that the defendants had violated the Education Consolidation and Improvement Act of 1981, which required appropriate consultation with parent advisory councils in the planning of migrant education programs. Valdez and her lawyers pointed out that Grover had disbanded the previously existing state parent advisory council in May 1982, replacing it with the Wisconsin State Superintendent's Advisory Council on Migrant Education. In this new body of 14 members, only 4 were the parents of current or former migrant children. At the first meeting, the council recommended a membership change to reflect a simple majority of migrant parents and students; Grover refused. Membership terms were from one to four years, and Grover contended that no membership changes could be made until a resignation or term expiration.

The defendants argued that parent advisory councils were permissible but not required and that the councils requested by Valdez would be unnecessary "administrative burdens." The court disagreed and found that the defendants had violated federal statutes and regulations regarding migrant parent involvement. Additionally, the court noted that the effectiveness of a migrant education program was improved by the participation of a majority of migrant parents.

While no federal regulation requires that the parents of migrant children must constitute a majority in parent advisory councils, this case is critical because it asserts the importance of migrant parent involvement. Migrant parents face various obstacles that impede their participation in their children's education. Work schedules and transportation problems prevent migrant parents from meeting with teachers and school administrators; however, social relationships can be just as discouraging. Skewed power relationships between migrant parents and school officials often result in a lack of parent involvement. Educators must recognize that migrant parents, particularly undocumented workers, may be intimidated by administrators and others who wield power. According to Donald Macedo and Lilia Bartolome, even the word migrant conjures an image that allows society to look down on an entire group of people:

Thus, we can begin to see that the term "migrant" is not used to

> describe migration of groups of people moving from place to place. . . . "Migrant" not only relegates Hispanics to a lower status in our society but it also robs them of their citizenship as human beings who participate and contribute immensely to our society.[14]

Additionally, the parents of Spanish-speaking migrant children are often blamed directly for their children's lack of progress.[15] Therefore, it is not enough to provide equal involvement opportunities to all parents. The rights of migrant parents to be involved significantly in their children's education must be protected and advocated.

Zavala v. Contreras[16]

By far the most significant court case involving migrant education was the 1984 *Zavala v. Contreras* decision. On behalf of their son Samuel Zavala, Jose Luis and Maria Zavala sued the Harlingen Independent School District, Dan Ives as the district superintendent, and Frank Contreras as director of the Migrant Education Division of the Texas Education Agency. Samuel had enrolled in the district on October 21, 1983, and wanted to participate in an extended-day program to make up work he had missed through his migrant moves. Without this program, Samuel would not have been able to make up enough work to be eligible for academic credit in his classes. Unfortunately, a school district regulation restricted eligibility for the extended-day program to students who had enrolled in the district on or before October 17. Samuel was allowed to attend regular classes but prohibited from participating in the extended-day program or earning academic credit for his fall classes. The suit alleged that the school district, by imposing the cut-off date, had failed to provide for Samuel's special educational needs as a migrant student.

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[14]Donald Macedo and Lilia I. Bartolome, "Dancing with Bigotry: The Poisoning of Racial and Ethnic Identities," in *Ethnic Identity and Power: Cultural Contexts of Political Action in School and Society*, eds. Yali Zou and Enrique T. Trueba (Albany: State University of New York Press, 1998), 362.

[15]Jim Cummins, *Negotiating Identities: Education for Empowerment in a Diverse Society* (Ontario, CA: California Association for Bilingual Education, 1996).

[16]*Zavala v. Contreras*, 581 F. Supp. 701 (TX.S.D.C., Brownsville Division, 1984).

The court decided the cut-off date had been determined in an arbitrary manner without giving consideration to the special circumstances of migrant students. Indeed, the cut-off date was exclusionary and denied services to the very population that federal migrant education dollars were slotted to help. Finally, the court ordered that all eligible migrant students who had registered after the October 17 cut-off date be allowed to make up work and receive academic credit for classes.

This case is particularly critical given a national drop-out rate of about 50 percent among migrant students.[17] It is crucial that all migrant children be given every opportunity to acquire academic credits toward graduation, especially in light of increasingly strict graduation requirements.

Overall, *Zavala v. Contreras* supported the cause of migrant education but also led to controversy in defining the complex term "special educational needs." The court stated that the term is difficult to define or regulate:

> Indeed, it would be a difficult, if not an impossible task, for any court to determine which one of two programs most effectively assisted migrant students in their schooling. Of course, the Court does not mean to imply that defendants can do no wrong; only that when a program is developed that arguably addresses the "special educational needs" of migrant students, defendants should not be held in violation of Title I . . . or the regulations promulgated thereunder.[18]

While accepting the fact that *special needs* is difficult to define, the court underscored that states cannot make only superficial attempts to comply with the law. In other words, the districts cannot use the lack of specificity in the definition of special needs to advocate discriminatory practices.

Along these same lines, it is critical that students are not punished for their lifestyles. Migrancy, by definition, indicates that students will not be able to adhere to the traditional August-to-June academic calendar. While this country accepts the economic need for migrants,

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[17]Wright, *Reauthorized Migrant Education Program.*

[18]*Zavala v. Contreras.*

we cannot take advantage of their willingness to relocate continually and then punish their children for an inability to be in one place for an extended period of time.

Lau v. Nichols[19]

Given that many migrant children are also English language learners (ELLs), it would be incomplete to discuss legislative and court battles without giving mention to the landmark 1974 court case of *Lau v. Nichols*. This case was a class-action suit brought on behalf of 1,800 Chinese children who were enrolled in San Francisco schools. The plaintiffs argued that the school system had not accommodated the children's limited English proficiency. This landmark U.S. Supreme Court decision determined that providing students with materials, teachers, and instruction in English did not constitute equal education if the students did not understand English. Eventually, the decision resulted in a series of guidelines designed to meet the special needs of ELLs. Contrary to common belief, the *Lau* decision did not mandate bilingual education as a solution. Recognizing the need for flexible responses to the challenge of educating non-English-speaking students, the decision required districts to develop their own answers to this critical issue. Most districts turned to bilingual education. In 1975, the U.S. Office of Civil Rights distributed guidelines that became known as the *Lau* Remedies. Using these guidelines, schools and districts could (1) determine whether a school district was in compliance with the law and (2) seek guidance in the development of education programs that would protect the civil rights of language-minority students. Numerous state cases refined these programs. Yet, without the strength of a legal mandate, the *Lau* Remedies often were challenged in courts, with mixed results, and, in 1981, the U.S. Department of Education dropped the remedies.

[19]Gloria Stewner-Manzanares, "The Bilingual Education Act: Twenty Years Later," *New Focus* No. 8 (fall 1998) (Washington, DC: National Clearinghouse for Bilingual Education) (ERIC Document Reproduction Service No. ED 337 031), http://www.ncela.gwu.edu/ncbepubs/classics/focus/06bea.htm/ (accessed November 7, 2002).

Equal Educational Opportunity Act

Of equal importance during this time was the passage of the Equal Educational Opportunity Act of 1974, which specifically mentioned that language barriers must be recognized and overcome through instructional strategies. While the *Lau* decision had an impact on districts receiving federal funds, the Equal Educational Opportunity Act required all schools and districts, regardless of funding sources, to take responsibility for helping non-English-speaking students learn. This act shifted the responsibility of overcoming language challenges from the students and their families to the schools and districts.

Bilingual Education Act of 1968[20]

The Bilingual Education Act provided federal funding to local districts and schools for incorporating bilingual education into the classroom. The funds were in the form of competitive grants to schools and districts. These funds were intended to provide resources for students, parent involvement programs, teacher training, and the development and dissemination of materials.

Originally designed to meet the needs of native Spanish speakers, the Bilingual Education Act was eventually consolidated with 37 other bills that became known as Title VII and, in the No Child Left Behind legislation, as Title III. Many migrant students also are considered to be ELLs or the children of ELLs and are eligible to receive services under both Title I and Title III of the ESEA.

The impact of the Bilingual Education Act on ELLs cannot be overstated. The act gave official legitimacy to the use of a child's native language in an educational setting. After Title VII, Spanish was supported financially through government funds. The Bilingual Education Act did not call specifically for bilingual education but for new ways of teaching English, which implicitly encouraged the use of bilingual education. Unfortunately, the Bilingual Education Act did not solve all problems associated with limited-English-proficient children, and, in 1974, major changes were enacted.

The Bilingual Education Act has always been controversial. The public debate over the effectiveness of bilingual educational practices

[20]Ibid.

is unresolved. California's passage of Proposition 227 in 1998 limited even English immersion programs to one year, emphasizing the ongoing opposition to bilingual education. Nevertheless, research indicates that English immersion programs do not always provide the quickest route to English proficiency, especially for students with disruptions in their education. For example, the transfer of cognitive skills from one language to another is maximized when students have reached a particular threshold of proficiency in their native language.[21] This level of proficiency is contingent upon students' ability not only to understand and communicate in the second language, but also to reason and perform higher level thinking skills in that language. Consequently, recent challenges to bilingual programs around the United States could have a negative impact on migrant students' ability to learn English.

Other recent changes in the ESEA reflect the public's concerns about bilingual education. For example, the name of the federal office dealing with issues related to bilingual education has been changed. The Office of Bilingual Education and Minority Language Affairs (OBEMLA) is now called the Office of English Language Acquisition, Language Enhancement and Academic Achievement for Limited English Proficient Students (OELA). This change reflects a growing emphasis on English acquisition above native language maintenance.

Conclusions

Migrant children have special educational needs that must be protected and supplemented through federal and legal interventions. There is no doubt that federal involvement has improved the education of migrant children and supported programs that potentially would not have existed without this aid. However, education continues to be primarily the responsibility of the states.

Educators, administrators, and lawmakers need to explore new methods to strengthen the federal-state collaboration to provide the most comprehensive education for all students, including transient and permanent residents. Migrant and other minority students test our education systems in ways that are not easily remedied. When we can

[21]Cummins, *Negotiating Identities*.

successfully educate children facing the most challenging situations, we can guarantee a meaningful education for all.

The decision to emphasize "No Child Left Behind" in the title of the latest ESEA reauthorization made a strong statement that all children will be given the opportunity to learn to their fullest potential. Even if some of them travel beyond our borders, we are not exempt from our pledge to educate every child.

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